Supreme Court, U.S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-670

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WILLIAM WIDMER,

Petitioner.

Petition for Writ of Certiorari to the
Appellate Division, First Department
State of New York

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QUESTION PRESENTED

Did the knowing use by the prosecution of false testimony procured by intimidation of prosecution witnesses violate petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution and the decisions of this Court in GIGLIO vs. UNITED STATES and NAPUE vs. ILLINOIS?

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OPINIONS IN COURTS BELOW

The unpublished decision by Justice Sullivan denying petitioner's motion to set aside the jury verdict, is reproduced at p.14-21. The petitioner's conviction was affirmed by Appellate Division, First Department without opinion. (p.24) The motions to the Court of Appeal for permission to appeal and for reconsideration were denied without opinion.

In The

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THE PEOPLE OF THE STATE OF NEW YORK,

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-against-

WILLIAM WIDMER,

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Petition for Writ of Certiorari to the
Appellate Division, First Department
State of New York

JURISDICTIONAL STATEMENT

The decision of the Appellate Division, First Department sought to be reviewed is dated January 29, 1980. The Court of Appeals of the State of New York (Wachtler, J.) denied leave to appeal on April 25, 1980. A timely application for reconsideration was denied on July 1, 1980.

Jurisdiction of this Court is conferred by Title 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES

> Amendment 14, United States Constitution . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Penal Law of the State of New York, Part 3, Article 155, Section 155.35 (McKinney's Consolidated Laws of New York, Book 39, p. 159)

§155.35 Grand larceny in the second degree

A person is guilty of grand larceny in the second degree when he steals property and when the value of the property exceeds one thousand five hundred dollars.

Grand Larceny in the second degree is a class D felony.

Penal Law of the State of New York, Part 3, Article 175, Section 175.50 (McKinney's Consolidated Laws of New York, Book 39, p. 303)

§175.50 Presenting a false insurance claim

A person guilty of presenting a false insurance claim when, with intent to defraud an insurer with respect to an alleged claim of loss upon a contract of insurance, he knowingly presents to the insurer or to an agent thereof a written instrument containing a false material statement to such claim.

Presenting a false insurance claim is a class A misdemeanor.

Criminal Procedure Law of the State of New York, Title J, L. 1970, c. 996, §1 (McKinney's Consolidated Laws of New York, Book 11A, p. 13)

§330.30 Motion to set aside verdict; grounds for

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

1. Any ground appearing in the record which, if raised upon appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or

3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

STATEMENT OF THE CASE

The petitioner, WILLIAM WIDMER, together with a co-defendant, one Edward S. Morgan, was indicted by the Grand Jury of Bronx County for the crimes of Grand Larceny in the Second Degree, a class "D" felony (N.Y. Penal Law §155.35) and Presenting a False Insurance Claim (N.Y. Penal Law §175.50), a class "A" misdemeanor. It was the contention of the prosecution that petitioner in his capacity as proprietor of Garson Automotive Center, and acting in concert with Morgan, collected approximately $3,200.00 from the Hartford Insurance Company for parts which were never replaced in Morgan's automobile.

A search warrant was secured by an officer of the New York City Police Department, authorizing seizure of the automobile. Parts were removed from the automobile and inventoried. Prior to trial the defendants moved to controvert the warrant and to suppress the physical evidence seized from the automobile. Petitioner also sought suppression of statements made to law enforcement personnel and documentary evidence obtained from him upon the grounds that they were obtained in violation of petitioner's rights under MIRANDA vs. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602 (1966). Hearings were held before the Hon. Donald Sullivan, a Justice of the Bronx County Supreme Court. Justice Sullivan denied both applications.

After a jury trial before Judge Sullivan petitioner was found guilty on both counts of the indictment. Subsequently, and prior to sentencing, petitioner moved to set aside the jury verdict pursuant to the applicable provision of the Criminal Procedure Law of the State of New York (§330.30) upon, inter alia, the grounds of newly discovered evidence and upon the further grounds that misconduct on the part of the prosecution and suppression of material evidence denied petitioner his constitutional right to a fair trial. Following a hearing before the trial judge the motion was denied in its entirety. The petitioner was sentenced to a period of three years' probation on each count and fined the sum of $250.00.

Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, First Department. On appeal petitioner contended as he had in the hearings below, that the holdings by the U.S. Supreme Court in BRADY vs. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194 (1963), NAPUE vs. ILLINOIS, 360 U.S. 264, 79 S.Ct. 1173 (1959) and GIGLIO vs. UNITED STATES, 405 U.S. 150, 92 S.Ct. 873 (1972) required reversal of his conviction. On January 29, 1980 the defendant's conviction was unanimously affirmed by the Appellate Division, without opinion. Petitioner's motion to the Court of Appeals for permission to appeal to that court was

denied on April 25, 1980. On May 20, 1980 petitioner served a motion for reconsideration in light of the decision by the United States Court of Appeals in DUBOSE vs. LEFEVRE, 619 F. 2d 973 (2nd Cir., 1980) which had been decided two days prior to the Court of Appeals' decision denying leave to appeal. On July 1, 1980 the Court of Appeals denied this application.

ARGUMENT

THE MISCONDUCT ON THE PART OF THE PROSECUTION, INCLUDING KNOWING SUPPRESSION OF MATERIAL EVIDENCE, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

The petitioner contended, in his application to the trial court to set aside the verdict and in his subsequent appeal to the Appellate Division, First Department, that there occurred during the investigation, grand jury presentment and trial on the indictment, serious and material misconduct on the part of the prosecution which required reversal of his conviction as a matter of law. Petitioner relied and continues to rely upon a series of decisions by this Court, beginning with NAPUE vs. ILLINOIS, 360 U.S. 264, 79 S.Ct. 1173 (1959) in support of this contention.

Although petitioner pointed to a pervasive pattern of misconduct, the issue centered around the testimony of a key witness, one John Campbell, the insurance adjuster who processed Edward Morgan's claim. Testimony at the hearing and tape recordings of conversations between the Assistant District Attorney, Police Lieutenant and Campbell, established that Campbell's testimony, a critical link in a chain of circumstantial evidence against the petitioner, was materially altered by means of threats and intimidation on the

part of the prosecution. One week prior to trial, Campbell related this fact to the Assistant District Attorney who tried the case. Nevertheless, Campbell was proffered at trial as a witness for the People whose credibility was unquestioned. The failure of the prosecutor to reveal the evidence relating to Campbell's credibility was a violation of petitioner's Constitutional rights and the principles enunciated in BRADY vs. MARYLAND, 373 U.S. 83, S.Ct. 1194 (1963) and GIGLIO vs. UNITED STATES, 405 U.S. 150, 92 S.Ct. 763 (1972).

In ruling on the motion to set aside the verdict nisi prius held that GIGLIO, supra, was inapplicable to the case at bar. It is respectfully submitted that this ruling was erroneous, and was based upon a misapplication of that case. In GIGLIO the petitioner sought a new trial on the grounds of newly discovered evidence. It was Giglio's contention that the testimony of a key witness had been procured by a promise of leniency. At a hearing on the motion for a new trial the assistant district attorney who presented the case to the Grand Jury admitted making such a promise. The offer of leniency was unknown to the assistant district attorney who tried this case, and was not revealed to the defense. The Supreme Court held that this conduct constituted a denial of due process under BRADY, supra, and NAPUE vs. ILLINOIS, 360 U.S. 264, 79 S.Ct. 1173 (1959) and ordered a new trial.

In the case at bar, the trial court was of the opinion that GIGLIO was inapposite because it involved knowing use of false testimony by the prosecution. Nisi prius concluded that no false testimony had been given by the witness, Campbell. Nevertheless, an examination of Campbell's testimony at the post-trial hearing shows that not only did Campbell alter his testimony under pressure from the prosecution, but that he was forced to make telephone calls to petitioner at his home and place of business. It is respectfully submitted that to conclude that no false testimony was given and thereupon disregard the principles enunciated in GIGLIO is to beg the question when the issue involves charges of altered testimony obtained by means of coercion. The central point in both the instant case and in GIGLIO is the credibility of a prosecution witness as presented to the Court and the jury, and the knowledge on the part of the prosecution of matters directly relating to the witness's credibility. As this Court held in GIGLIO, the jury was entitled to hear evidence which affected the capacity of the witness for truthfulness. Furthermore, in both the GIGLIO and WIDMER cases, the tainted testimony was procured by the prosecutor who presented the case to the Grand Jury. In GIGLIO this conduct was attributed to the trial prosecutor although he had no direct knowledge of it. In the

instant case the trial prosecutor knew that his witness had been tampered with, and yet he concealed this fact from the court, the jury and the defense. By allowing his witness to testify without revealing this bright on his credibility, the prosecution violated petitioner's right to due process.

In recent decisions, the United States Court of Appeals for the Second Circuit has steadfastly applied these principles. In DUBOSE vs. LEFEVRE, 619 F. 2d 973 (2nd Circ., 1980) a case strikingly similar to the WIDMER case both in substance and in the procedural context in which it arose, the petitioner was convicted of the crime of murder in the second degree following a jury trial in Bronx County Supreme Court before the same judge who presided in the WIDMER case. Thereafter, Dubose moved to set aside the verdict and dismiss the indictment, contending that the chief prosecution witness had testified falsely at trial, with the knowledge of the prosecution, regarding a promise of leniency allegedly made in exchange for her testimony.

Once again, a hearing was held, after which the trial judge found Dubose had received a fair trial and denied the motions. The Appellate Division affirmed, and permission to appeal to the Court of Appeals was denied. Dubose then sought a writ of habeas corpus from the United States District Court for the Southern District of New York. The application for a writ was denied. On appeal, however, the Second Circuit reversed

and ordered that the writ be granted unless Dubose was afforded a new trial. Judge Mansfield, writing for the unanimous three judge panel, examined the record of the post trial hearing in detail, and specifically rejected the trial court's findings that no promise had been made to the witness and that the jury had been adequately informed. Citing inter alia, GIGLIO and NAPUE supra, Judge Mansfield held that due process had been denied by the knowing use of false testimony which bore on the credibility of a witness.

Moreover, in UNITED STATES vs. GLOVER, 583 F.2d 876 (2nd Cir., 1978) the Second Circuit held that under NAPUE, supra, even if the testimony of a witness were not false but merely "mistaken" and the prosecution "had not been aware of the inaccuracies until after the testimony was given" there would still be an obligation under the Fourteenth Amendment "not knowingly to allow false testimony to go uncorrected." UNITED STATES vs. GLOVER, 588 F.2d at 879.

These holdings are consistent with the principles enunciated by this Court in NAPUE vs. ILLINOIS, 360 U.S. 264, 79 S.Ct. 1173 (1959) and BRADY vs. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194 (1963). In BRADY, this Court held that the prosecution's good faith or bad faith in failing to reveal evidence favorable to the defense, is irrelevant. In NAPUE, the Court held that a"conviction obtained through the use of

false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269. Furthermore, NAPUE stands for the proposition that a new trial is required even "when the State, although not soliciting false evidence, allows it to go uncorrected when it occurs." Finally, NAPUE holds that

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of given witness may will be determinative of guilt or innocence, and it is upon such subtle factors . . . that a defendant's life or liberty may depend." (Emphasis added) 360 U.S. at 269.

It is respectfully submitted that the decisions by the New York state courts in the instant case are decisions on a federal question of substance which are not in accord with the applicable decisions of this Court as cited above. Therefore, the petitioner prays for a writ of certiorari to the New York Supreme Court, Appellate Division, First Judicial Department, so that these questions may be reviewed.

Respectfully submitted,

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OPINIONS IN COURTS BELOW

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX : TRIAL TERM, PART XVIII

THE PEOPLE OF THE STATE OF NEW YORK

Ind. No. 1783/76

-against-

WILLIAM WIDMER

Defendant.

DONALD J. SULLIVAN, J.

Defendant Widmer moves, prior to sentence, pursuant to CPL 330.30 to set aside the jury verdict, upon the grounds of; 1) newly discovered evidence, 2) prosecutorial misconduct, 3) incompetent counsel, and 4) that the verdict was contrary to the weight of evidence. This defendant was convicted after a jury trial of Grand Larceny in the Second Degree and Presenting a False Insurance Claim. He was tried with a co-defendant, Edward Morgan, who was found guilty of Presenting a False Insurance Claim.

The court conducted a hearing pursuant to CPL 330.40 (2)(f). Upon an in-depth review of the testimony of Victor DeVeus, Detective Harvey Wyche, Rocco J. Scalone, Esq., Assistant District Attorney James Feretic, former Assistant District Attorney Roger Milch, Lester Tow, John Campbell, Edward Morgan, John Aquart, Chris Atridge and the affidavits and exhibits submitted by the respective parties, the court concluded that the motion must be denied in toto.

The People's case was that the defendant, Widmer and co-defendant, Morgan, engaged in a scheme to defraud the Hartford Insurance Company. The means used to accomplish this scheme was the submission of a false claim of property damage to Morgan's car and resulted in the defendants realizing a sum of money. The defendants argue that the damage to the automobile was caused by others not apprehended who stripped and dismantled the car.

The authority to grant a new trial, unavailable at common law, is a statutory creation to be exercised cautiously in the sound discretion of the trial court (People v. Patrick, 182 NY 131; People v. Salemi, 309 NY 208). The grounds to set aside a verdict based upon newly discovered evidence are defined in CPL 330.30. Such evidence must be of such a nature that it could not have previously been discovered by the exercise of due diligence, it must be of material interest to the disputed issue, not cumulative in nature nor impeaching or contradictory of the evidence and be of such probative value as to create a probability that had such newly discovered evidence been received upon the trial of the matter, the defendant would have had a more favorable outcome, (People v. Jones, 194 NY 83; People v. Sorrell, 39 Misc. 2d 559, affd. 21 AD 2 954). On a motion of this type, the defendant has

the burden of proving by a preponderance of the evidence that had the allegedly newly discovered evidence been introduced at trial, it would have resulted in a more favorable verdict to the defendant (People v. Wagner, 51 AD 2d 186; CPL 330.30 (3); CPL 330.40 (2)(g)).

Firstly, the record is clear that both the defendant and his former counsel were fully aware of the allegations now made of alleged threats and alleged coercion against witnesses many months prior to this trial. The defense had ample opportunity to explore and exploit this issue at the trial by cross-examination of the witnesses. Further, the defendant testified and could have, had the defense desired to, brought to the attention of the court and the jury these allegations. Therefore, the allegations of threats and coercion of witnesses who testified at trial does not meet the statutory test. With respect to the allegations of persons who may have testified at the trial, this court finds that their testimony, at best, was vague and conflicting and would merely have been cumulative to the testimony presented at trial or offered merely to impeach the credibility of some of the People's witnesses. Such testimony can not be considered newly discovered evidence by the standards enunciated above.

This court further finds that the defendant has failed to sustain his burden of establishing that any of the above "newly discovered evidence" is of such probative value as to create a probability, that had it been submitted to the jury the outcome of the trial would have been more favorable to the defendant (People v. Slaughter, 37 NY 2d 596; People v. Bartholomew, 73 Misc. 2d 541).

Secondly, the defendant argues that he was denied a fair trial due to threats of the Assistant District Attorney against himself and other witnesses alleged to be friendly to the defendant. The defendant's allegations rely principally upon a letter from the original Assistant District Attorney handling the case to three witnesses: John Campbell; Lester Tow; and, Detective Harvey Wyche and a tape recorded conversation between Campbell, Detective DeRosa and the present Assistant District Attorney handling the case. A review of the entire record including the tape recording and testimony adduced at the hearing indicates that the entire tenor of the letter and the recorded conversation does not reach the level of improper acts by the prosecution. The letter appears to represent a considered opinion of an assistant

district attorney, after having interviewed certain witnesses, that their testimony was not entirely truthful and that should they testify, a waiver of immunity would be necessary. The admonition to state the truth before the Grand Jury or at the trial and not subject oneself to the possible crime of perjury is not interpreted by this court as a threat. The tape recorded conversation, under the circumstances, appears to be a general preparation by the District Attorney's office of its witness and how best to present the prosecution's evidence. The record is devoid of any manifest attempt or inducement by the prosecution to have Campbell testify falsely or in such a fashion as would be contradictory to Campbell's own recollection of the facts. Campbell stated at the hearing that his testimony would remain substantially the same at a future trial. In any event, the alleged prosecutorial misconduct was known by the defendant and his counsel well in advance of the trial. Defendant's deliberate choice to refrain from exposing it to the court and jury can not now be used as a basis for a new trial. The defendant's reliance on Giglio v. U.S., 405 US 150, is misplaced. In Giglio, a new trial was ordered where the court determined that there was false testimony given at trial with

the knowledge of the People. The crux of the case lies in the knowing use by the prosecution of false evidence. In this case, there admittedly was no false testimony given by Campbell. Hence, there is no merit to the defendant's contention of any deliberate deception or non-disclosure by the People. Under the circumstances, this court finds that there was no prejudicial conduct by the prosecution so as to deprive this defendant of his constitutional due process rights (see, People v. Washington, 32 NY 2d 401, 403: "Where, however, as here, both the defendant and his counsel, with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation, we would make a very limited exception to the Savvides rule. To do otherwise, in our view, would be merely to punish the prosecution, and thus to penalize the People, where there cannot be said to be legitimate interests of the defendant to be protected.").

Thirdly, the defense's claim that the defendant had incompetent trial counsel is without merit. Former trial counsel testified at the hearing before this court that he has been in the private practice of law for the past forty-six years and has handled approximately five hundred criminal cases. His sworn testimony is that he thoroughly investigated the facts of this case, person-

ally interviewed and obtained statements from the various witnesses, that he was aware of alleged threats by the prosecution directed against the defendant, his wife and other witnesses and that after exhaustive consultations with the defendant and counsel for the co-defendant decided upon which witnesses would be most beneficial to the defendant's case and which strategy would most likely prevail at trial. He further testified that he fully researched the applicable areas of law necessary in a trial of this matter. Counsel impressed this court as being truthful, thorough and diligent. While it is difficult to determine precisely what constitutes adequate and effective counsel within the meaning of the 6th Amendment, the court in People v. Droz (39 NY 2d 457, 462) expressed it as follows:

> "We have often noted that it is impossible to precisely define 'inadequate' or 'ineffective' legal representation or'to formulate standards which will apply to all cases' (People v. Bennett, 29 NY 2d 462,466). However it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense (People v. Bennett, supra) and who is familiar with, and able to employ at trial basic principles of criminal law and procedure (People v. LaBree, 34 NY 2d 257; cf. People v. Jones, 25 NY 2d 637). Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors particularly on basic points essential to the defense, are often found to be determinative (see, e.g. Peo. v. Bennett, supra; Peo. v. LaBree, supra)."

The defendant himself retained his former trial counsel who conducted the trial with a reasonable degree of diligent,

competent, skillful and effective advocacy. Further, it is the court's opinion that the performance of trial counsel was not of such a nature as to render "the trial a farce and a mockery of justice" (Robillard v. Calif., 55 Cal 2d 88, cert. den. 365 US 886; People v. Tomaselli, 7 NY 2d 350, 354).

Lastly, defense argues that the verdict was contrary to the weight of evidence. This court finds that the defense has failed to sustain the burden of showing by a preponderance that the evidence presented at trial was insufficient to support the jury's verdict of guilt and that upon an appeal of a prospective judgment of conviction, a reversal or modification of the judgment as a matter of law by the appellate court would be required (People v. Zipfel, 51 AD 2d 979). In any case, sufficient facts appear on the record of the proceedings underlining a prospective judgment of conviction for an adequate review of the issue raised by the Appellate Division if the defendant perfects an appeal of such judgment.

It is upon considerations such as these that this motion must be denied in toto.

Dated: April 3, 1978

J. S. C.

State of New York
Court of Appeals

RECEIVED 7/3/80

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

WILLIAM WIDMER

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application ~~timely made~~ for reconsideration by the above-named appellant for a reconsideration certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
July 1, 1980

Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, Bronx, April 3, 1978; affirmed by Appellate Division, First Department, January 29, 1980.

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

WILLIAM WIDMER

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
April 25, 1980

Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, Bronx, April 3, 1978; affirmed by Appellate Division, First Department, January 29, 1980.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 29, 1980

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman
Samuel J. Silverman
Max Bloom
J. Robert Lynch Justices

The People of the State of New York, Respondent, -against- William Widmer Defendant-Appellant.	Order of Affirmance on Appeal from Judgment 7274

An appeal having been taken to this Court by the defendant-appellant

from the judgment of the Supreme Court, Bronx County (D. Sullivan, J.),

rendered on April 3, 1978, convicting defendant of grand larceny in the second degree and presenting a false insurance claim

and said appeal having been argued by Mr. Robin Willcox

of counsel for the appellant , and by Mr. Robert Lefevre

of counsel for the respondent ; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

JOSEPH J. LUCCH

Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.